

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TAMI ARNOLD</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 270,628
<b>MORNING STAR MINISTRIES</b>	)	
Respondent	)	
AND	)	
	)	
<b>COMMERCIAL UNION INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the April 8, 2011, Order by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on July 6, 2011. Gary R. Terrill of Overland Park, Kansas, was appointed by the Director to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie A. N. Sample.

**APPEARANCES**

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record contained in the administrative file. There was no hearing held by the ALJ. The ALJ considered the affidavit by Mr. Ostrowski itemizing fees and expenses filed on April 5, 2011, and the written response of Mr. Cunningham filed on April 8, 2011. The Board considered those documents as part of the record.

**ISSUES**

In the April 8, 2011, Order, ALJ Moore awarded Mr. Ostrowski \$5,432.02 in attorney fees and expenses.

The claimant requests review of the amount awarded for claimant's attorney fees, specifically (1) whether time spent by claimant's attorney, under all circumstances, prior to the entry of appearance should be assessed against respondent; (2) what is the proper hourly rate for services rendered; (3) whether additional attorney fees are appropriate for processing this appeal; and (4) whether, in the alternative, this matter should be remanded for a hearing relative to the assessment of attorney fees. Claimant's counsel requests that the Board approve \$7,376.02 in attorney fees and expenses.

Respondent argues that the ALJ's Order should be affirmed and argues that claimant's attorney is only entitled to compensation for work completed once he became the attorney of record and not for anything completed in the process of determining whether to take the claimant's case. Respondent asserts attorney fees of no more than \$150 an hour is reasonable for the location where services were provided.

The issues are:

1. Whether this matter should be remanded to the ALJ for a hearing on the assessment of attorney fees.
2. If not, should claimant's counsel be awarded fees for services rendered prior to the time he entered his appearance?
3. What is the proper hourly rate for services rendered by claimant's counsel?
4. Whether claimant's counsel should be awarded additional attorney fees for services associated with this appeal.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On March 18, 2010, respondent filed a post-award Application for Preliminary Hearing, requesting to change claimant's authorized treating physician from Dr. Steven R. Peloquin to Dr. Jon C. Parks. Respondent alleged that the pain management provided by Dr. Peloquin was not effective and, in fact, was counterproductive. Respondent provided proper notice of the hearing to the claimant, Ms. Arnold, as claimant's former counsel had withdrawn as her attorney on January 11, 2008. A post-award hearing was held on April 22, 2010, and respondent appeared through its counsel. Claimant did not appear because she was undergoing medical treatment for a health condition unrelated to her claim. No testimony was taken. The ALJ announced he was treating the matter as an application for post-award medical, he was allowing respondent to take the deposition of Dr. Parks, and he set terminal dates.

Claimant's current attorney, Mr. Ostrowski, entered his appearance on June 22, 2010. Depositions were taken of claimant, Dr. Peloquin, and Dr. Parks. Only respondent's counsel appeared at Dr. Parks' deposition, as claimant's counsel had yet to enter his appearance. At the request of the parties, several extensions of the terminal dates were granted by the ALJ. The ALJ issued a Post-Award Medical Award on March 17, 2011. The sole issue was whether Dr. Peloquin should be removed as authorized treating physician and replaced with Dr. Parks.

The ALJ succinctly detailed claimant's medical treatment and the facts necessary to determine whether or not Dr. Peloquin should remain as claimant's authorized treating physician. It is unnecessary to again recite those facts here. The ALJ found respondent failed to prove Dr. Peloquin's treatment of claimant is objectively unsatisfactory and allowed Dr. Peloquin to remain as claimant's authorized treating physician. In his March 17, 2011, Post-Award Medical Award, the ALJ addressed the issue of attorney fees by stating:

Claimant's counsel is directed to submit and file with the court an affidavit of time and expenses incurred in defending Respondent's application for change of physician, and to serve a copy upon Respondent's counsel. Respondent will have seven days after receipt of Claimant's counsel's affidavit to offer a written response. Thereupon, the court will enter an order regarding attorneys fees and expenses.<sup>1</sup>

On April 5, 2011, Mr. Ostrowski submitted an affidavit itemizing fees and expenses in the total amount of \$6,798.52, which included the following:

39.10 hours at the rate of \$165 per hour	\$6,451.50
1.85 hours at the rate of \$65 per hour	\$120.25
Expenses	\$226.77 <sup>2</sup>

Respondent's counsel represented at oral argument before the Board that he sent a letter by facsimile<sup>3</sup> to the ALJ at 12:50 p.m. on April 8, 2011, objecting to the amount of attorney fees sought by claimant's counsel.<sup>4</sup> Respondent's counsel had two objections: (1) Mr. Ostrowski should not be paid for 5.2 hours of legal services before he entered his appearance on behalf of the claimant and (2) Mr. Ostrowski's hourly rate should be limited

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<sup>1</sup> ALJ Post-Award Medical Award (Mar. 17, 2011) at 7.

<sup>2</sup> Claimant's Affidavit (filed Apr. 5, 2011).

<sup>3</sup> The April 8, 2011, letter from respondent's counsel to the ALJ in the administrative file indicates it was sent to the ALJ by e-mail.

<sup>4</sup> At oral argument before the Board respondent's counsel acknowledged the ALJ e-mailed his Order to the parties at 2:52 p.m. on April 8, 2011.

to \$150 per hour, as \$150 per hour is reasonable. Based upon these arguments, respondent asked that claimant's fees (with expenses) be limited to \$5,432.02.

The ALJ issued an Order on April 8, 2011, awarding Mr. Ostrowski attorney fees and expenses totaling \$5,432.02, the amount suggested by respondent's counsel, and the Order was e-mailed to the parties at 2:52 p.m. on the same day. Claimant appeals the ALJ's Order and in his brief, claimant's counsel lists the following issues:

1. Whether time spent by claimant's attorney, under all the circumstances, prior to the entry of appearance should be assessed against respondent/insurance carrier.
2. What is the proper hourly rate for services rendered?
3. Whether additional attorney's fees are appropriate for processing this appeal.
4. Whether, in the alternative, the matter should be remanded for a hearing relative to the assessment of attorney's fees.<sup>5</sup>

Respondent requests this Board affirm the ALJ's Order concerning attorney fees.

**Whether this matter should be remanded to the ALJ for a hearing on the assessment of attorney fees.**

This Board will first take up the issue of whether this claim should be remanded for a hearing by the ALJ to resolve the issue of attorney fees, as the ALJ issued an Order awarding fees to claimant without conducting a hearing. K.S.A. 2010 Supp. 44-510k(c) allows an ALJ to award attorney fees and costs on the claimant's behalf in a post-award medical hearing. That statute states:

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

The applicable part of K.S.A. 44-536 states:

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney

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<sup>5</sup> Claimant's Brief at 2 (filed Apr. 26, 2011).

fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

(h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

The ALJ's March 17, 2011, Post-Award Medical Award instructed claimant to submit an affidavit of time and expenses to the court and send a copy to respondent's counsel. Respondent had seven days to file an objection, which respondent timely filed. The ALJ then issued an Order awarding Mr. Ostrowski attorney fees and expenses.

This Board has previously held that where a dispute arises concerning attorney fees following a post-award medical award, K.S.A. 44-536(h) provides the dispute shall be heard and determined by the ALJ. In *Lytle*<sup>6</sup> the Board stated:

Under K.S.A. 44-536(g), the ALJ can assess attorney fees against an employer and its insurance carrier for the legal services rendered an injured worker to obtain additional medical treatment following a final award. K.S.A. 44-510k(c) specifically provides an ALJ may award attorney fees for services rendered seeking post-award medical benefits. And K.S.A. 44-536(h) further provides that all disputes regarding attorney fees shall be heard and determined by the ALJ.

In the current claim, the ALJ issued his Order and it was e-mailed to the counsel for claimant and respondent two hours after the ALJ received respondent's objection to claimant's attorney fees. K.S.A. 44-536(g) requires the attorney fees awarded to be

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<sup>6</sup> *Lytle v. J & J/BMAR Joint Ventures, LLP*, No. 1,029,543, 2010 WL 517315 (Kan. WCAB Jan. 29, 2010).

reasonable and customary to the locality. One of respondent's objections was that the hourly rate charged by claimant's attorney was not customary. The ALJ did not give claimant a chance to respond to this allegation or, in the alternative, to request a hearing.

A hearing allows the parties a fair and equal opportunity to provide the ALJ information as to whether the fees being requested are reasonable and customary. The ALJ's Order does not provide any reasoning as to why he awarded the attorney fees recommended by respondent. Simply put, before issuing his Order, the ALJ did not follow the procedure set forth in K.S.A. 44-536(h). The Board is authorized to remand any matter to the ALJ for further proceedings when deemed necessary. Therefore, the Board must remand this matter to the ALJ for a hearing to determine whether the attorney fees of claimant are reasonable and customary.

**Should claimant's counsel be awarded fees for services rendered prior to the time he entered his appearance?**

This issue is remanded to the ALJ for hearing.

**What is the proper hourly rate for services rendered by claimant's counsel?**

This issue is remanded to the ALJ for hearing.

**Whether claimant's counsel should be awarded additional attorney fees associated with this appeal.**

Claimant's counsel requests this Board award additional attorney fees incurred by claimant as a result of this appeal. This Board has routinely held, see *e.g. Noll*<sup>7</sup> and *Stithem*,<sup>8</sup> that where a party requests attorney fees for an appeal, the matter should be remanded to the ALJ for hearing. In *Edwards*<sup>9</sup> this Board held:

Lastly, in claimant's brief to the Board, claimant's attorney requested additional attorney fees of \$480. The time was spent preparing for the Board review. K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. This would include the request for additional attorney fees in connection with this review. Accordingly, the request for additional attorney fees is remanded to the ALJ for further proceedings, if necessary, regarding the request for additional attorney fees.

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<sup>7</sup> *Noll v. Lincoln Grain, Inc.*, No. 172,114, 2002 WL 985396 (Kan. WCAB Apr. 26, 2002).

<sup>8</sup> *Stithem v. Cessna Aircraft Co.*, No. 1,012,897, 2008 WL 2673166 (Kan. WCAB June 30, 2008).

<sup>9</sup> *Edwards v. Jim Mitten Trucking, Inc.*, No. 199,988, 2008 WL 2673151 (Kan. WCAB June 30, 2008).

Accordingly, this Board finds that the issue of whether claimant is entitled to attorney fees associated with this appeal is remanded to the ALJ for hearing.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated April 8, 2011, is remanded for hearing to: (1) determine the appropriate attorney fees to be awarded claimant associated with the March 17, 2011, Post-Award Medical Award and (2) to determine the appropriate attorney fees, if any, that claimant is awarded as a result of this appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant  
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge